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ATTRACTIVE NUISANCE DOCTRINE—APPELLATE DIFFERENCE ON FACTS.

United Zinc & Chemical Co. v. Britt, 42 Sup. Ct. 299 (March 27, 1922).

The facts in the above case, as stated by Mr. Justice Holmes in the majority opinion, were:

"This is a suit brought by the respondents against the petitioner to recover for the death of two children, sons of the respondents. The facts that for the purposes of decision we shall assume to have been proved are these. The petitioner owned a tract of about twenty acres in the outskirts of the town of Iola, Kansas. Formerly it had there a plant for the making of sulphuric acid and zinc spelter. In 1910 it tore the buildings down but left a basement and cellar, in which in July, 1916, water was accumulated, clear in appearance but in fact dangerously poisoned by sulphuric acid and zinc sulphate that had come in one way or another from the petitioner's works, as the petitioner knew. The respondents had been travelling and encamped at some distance from this place. A travelled way passed within 120 or 100 feet of it. On July 27, 1916, the children, who were eight and eleven years old, came upon the petitioner's land, went into the water, were poisoned and died. The petitioner saved the question whether it could be held liable. At the trial the Judge instructed the jury that if the water looked clear but in fact was poisonous and thus the children were allured to it the petitioner was liable. The respondents got a verdict and judgment, which was affirmed by the Circuit Court of Appeals, 264 Fed. 785."

It was further stated for the majority (l. c. 300; all italics hereafter are ours) that:

"In the case at bar it is *at least doubtful* whether the water could be seen from any place where the children lawfully were and *there is no evidence that it was what led them to enter the land.* But that is necessary to start the supposed duty.

"It does not appear that children were in the habit of going to the place; so that foundation also fails."

The judgments of the two lower courts, based upon the verdict for plaintiff, were reversed, and it was held or intimated that the attractive nuisance doctrine would be confined to cases where children were *attracted* by *dangerous machinery* to trespass, and that Railroad v. Stout, 17 Wall. 657, 21 L. Ed. 745 (Turntable case) will be followed but not extended in application.

In the dissenting opinion by Mr. Justice Clarke, in which the Chief Justice and Mr. Justice Day concurred, it is stated (l. c. 301) that:

"The testimony shows that not only the two boys who perished had been attracted to the pool at the time, but that there were two or three other children with them, whose cries attracted men who were passing near by, who, by getting into the water, succeeded in recovering the dead body of one child and in rescuing the other in such condition that after lingering for a day or two, he died.

"The facts, as stated, make it very clear that in the view most *unfavorable* to the plaintiffs below there might be a difference of opinion between candid men as to whether the pool was so located that the owners of the land should have anticipated that children might frequent its vicinity, whether its appearance and character rendered it attractive to childish instincts so as to make it a temptation to children of tender years, and whether, therefore, it was culpable negligence to maintain it in that location, unprotected and without warning as to its poisonous condition. This being true, the case would seem to be one clearly for a jury, under the ruling in the Stout Case, supra."

While the dissenting opinion urges the *"humane"* doctrine as distinguished from the *"hard doctrine"* or *"Draconian doctrine,"* we do not understand the dissent to be based upon that ground, but upon the ground that a case for the jury was made under the authority of Railroad v. Stout, supra, and is therefore founded (as expressly stated) upon a difference as to the *facts.* That view of the dissent is *necessary,* unless the majority opinion is to be construed as holding that the attractive nuisance doctrine is to be absolutely confined to *machin-*

ery or even narrowed to turntables, which would not only be *absurd* but would be *legislation* and not a judicial application of principles, doctrines and rules.

Great minds may differ as to the soundness of the attractive nuisance doctrine, or as to its proper limitations if conceded to be sound. Most courts have recognized that a denial of the doctrine in some cases would be inconsistent with the ideals and principles of civilized society. The difficulty involved in its proper limitation has been responsible for most of the doubts as to its soundness, and has caused some courts to be unreasonably alarmed as to the extent to which it might be carried.

"There has been marked judicial eloquence and astuteness in stating the legal ground of liability in the turntable cases and no little difficulty is found in formulating sound and settled legal principles for it to rest on, but it is established in our law, and doubtless on principle ought to be applied (in those jurisdictions asserting the doctrine) to other cases coming strictly within the limits of the doctrine and presenting every ear-marking element upon which liability is predicated in the principal case. While this is so, the manifest distress and injustice flowing from unnecessarily extending the doctrine, or loosely applying it to many conceivable cases, has caused those courts accepting it to restrict its application to the narrowest bounds.

"If the old channel of the law is to be quite changed by the application of the new doctrine automatically and without discrimination, if sentimental considerations (however elevated and tender) are to usurp the place of cold and calm reason as the foundation for rules of law, then the floodgate now damming back liability will be raised in letting in strange and deep waters for the landowner to struggle with. Not only will he be liable for boys drowned while swimming in his stock pond (the idea of swimming being alluring to a boy), for those who fall into uncovered wells, cisterns and cellars (the notion of playing on the brink of such being a boyish one), for children who are suffocated while playing in piles of sand accumulated for building purposes or in sliding down stacks of straw unscientifically piled and exposed, but he may be mulcted in damages for injuries to his neighbors' children, who, romping in his haymow, without his invitation, break their bones by sliding down his hay chute, or those who, playing in his rock quarry, are hurt. Shall he fence against adventurous, trespassing boys? Almost as well suggest "that he build a wall against birds." If he is held to liability for injury to the children of Jones because of the way he piles his lumber, by the same token, as to Brown, liability would be fastened on him for the way he piles his stones, his bricks, his corn in pens, his hay ricks and his cord wood on private grounds—in fact, as has been pointedly said, ever land owner will be liable for injuries to his neighbor's children under the new doctrine *except the neighbor himself.* We can not well write the law that way." Judge Henry Lamm in Kelly v. Benas, 217 Mo. 1 (1909).

Much confusion of thought has resulted, too. from a failure to recognize that the doctrine is limited to cases where the child was a *trespasser,* and that decisions in cases where the child was where it had a right to be do not constitute extensions of the doctrine. O'Hara v. Gas Light Co., 244 Mo. 395. And cases such as Glasgow Corporation v. Taylor, 126 Law Times 262 (1921), wherein the House of Lords (reversing several lower courts) held the proprietors liable where a child in a *public* garden ate poisonous berries from a shrub therein, resulting in its death, do not necessarily rest upon the doctrine.

The judiciary, having invented the doctrine, can and should limit it to classes of cases where its application is necessary for the public good. The majority opinion in the instant case states what may be its proper and reasonable limitations, *if the Court does not intend to confine the doctrine to machinery.*

If the facts in the present case were such as to cause a difference of opinion on them among the members of our highest appellate court, it was certainly one for the jury. If the majority intended to hold that the doctrine would be restricted to machinery or turntable cases, that fact should have been stated in no uncertain terms.

NOTES OF IMPORTANT DECISIONS.

SOLDIERS BONUS AMENDMENT HELD VALID.—The case of Fahey v. Hackmann, 237 S. W. 752, decided by the Supreme Court of the State of Missouri, holds that the Constitutional amendment authorizing the issuance of bonds for the payment of bonus to soldiers and sailors was properly and validly enacted. Meeting the several points raised against the amendment the Court holds that the amendment is not invalid because of the insufficient publication in one county previous to the election, nor because the amendment was submitted to the voters at a special election. It was also contended that the statute passed pursuant to the amendment to the constitution was invalid because it created a debt in excess of constitutional limitation and for a prohibited purpose. Objection was also made to the sufficiency of the title of the bonus statute. The Court, however, held against all of these contentions. It was also held that the constitutional amendment authorizing the bond issue for the payment of the bonus was not self-executing, but required a legislative act before the bonds could be issued or sold. The constitutional provision that the legislature should pass the Soldiers Bonus Statute did not prevent referendum thereon. The statute is subject to referendum, and not effective for ninety days after adjournment of the legislature, notwithstanding it contained an emergency clause.

INCREASING GOVERNMENTAL POWERS AND ACTIVITIES.*

It is not a part of my subject to dwell on the encroachment of the federal power on the power of the states; nor the encroachment of the states on federal authority; it is the increasing daily direct influence, the encroachment, if you will, of governmental power and action, state and federal, on and in the life of the individual.

It was not my purpose, when I began my preparation of these remarks, to mention at all the extension of federal power by recent amendments to the Constitution of the United States. When one thinks of the matter, though, as it was called to my thought in making this preparation, the circumstances attendant upon, and the contents of, recent amendments to the Constitution of the United States must bring apprehension to those of us who revere, and desire to preserve unimpaired, the institutions of our fathers: Soon after the adoption of the Constitution itself, and ending in 1804, the first twelve amendments to the Constitution were duly adopted, nine of them constituting a bill of rights that was intended to protect the individual against the abuse by Congress, and other agencies of the federal government, of the powers conferred on them by the Constitution; the tenth was to make it clear that powers not specifically granted were reserved to the states or to the people; the eleventh concerned the jurisdiction of federal courts; and the twelfth made provision for the election of President and Vice-President. From 1804 until after the civil war no amendment was made, and, between the ending of the civil war and 1870, the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted, in order to give complete and adequate effect to the result of the civil war, to-wit: the freeing of slaves. These were the only amendments until 1913, a point of time less than ten years ago, and more than one hundred and twenty years after the adoption of the Constitution. Between February, 1913, and November, 1920, at separate times, and not as the result of any revolution or recognized crisis, there have been adopted four additional amendments. One of these, the Seventeenth, is individualistic, and anti-representative, in its tendency, and does not enlarge any of the powers or activities of government—it provides for the election of United States Senators by popular vote instead of by the state legislatures. Another, the Nineteenth Amendment, also does not add power to government, however much, in the opinion of many, it adds righteousness, and however much it is likely in the future to add activity—it provides for

*Revision of an address before the North Carolina Bar Association.

woman suffrage throughout the land. A third of these amendments, the Sixteenth, gives Congress power to collect taxes on incomes without apportionment among the several states; this has enormously increased the points of contact between the federal government and the individual, and it has, for practical purposes, enormously extended, collaterally, the power of Congress. The Eighteenth Amendment, prohibiting the sale of intoxicating liquors, is most significant of all. Without reference to our opinion as to the practical wisdom and effectiveness of prohibition, it is not to be denied that the adoption of this amendment, is, in the first place, a striking repudiation of the dogma of "home rule" which was a part of the political philosophy, nay, even of the religion, of the founders of our Republic: a saloon selling intoxicating liquors to local consumers in Newark, New Jersey, is closed, notwithstanding the protest of the saloon-keeper himself, and the protest of a majority of the citizens of Newark, and the protest of the legislature of New Jersey! More than that, this amendment imports into a constitution which, as theretofore conceived, should lay down general principles and prescribe general rules, a particular rule of conduct ordinarily dealt with by statute. A statute may be retained on the statute-books or amended or repealed, according to the current predominating public opinion; but, whatever a majority of the people of the United States may believe twenty or thirty or forty years from now, it is and will remain a crime in any part of the United States to deal in intoxicating liquors, unless and until, in the constitutionally prescribed way, two-thirds of both houses of Congress and three-fourths of all the state legislatures repeal the Eighteenth Amendment.

I shall discuss the extension of the power and activities of the state governments only with respect to their police power, and the restraining effect of the Constitution of the United States on the state's exercise of police power. It would be quite beside my purpose, therefore, to enter into any description or discussion of the amendments that have been made to state constitutions.

This government was founded by those who believed in the greatest individual freedom. Individual freedom was in the air —it was the shibboleth of political philosophers and social reformers when this government was in the forming. Adam Smith's "Wealth of Nations" had recently been published, and it formed the literature most quoted by the draftsmen and early interpreters of our Constitution. No more powerful argument for unrestricted individualism has been written. That great book, like most great books, reflected, more than it influenced, the trend of thought of its day. While Mr. Jefferson was not physically present when the Constitution was written, he undoubtedly, by his relations with, and influence over, Mr. Madison and other members of the convention, was influential in its drafting, and he was tremendously influential in the early conception of the effect of its provisions. I find, among Mr. Jefferson's letters, one to a nephew who was about to begin the reading of law, and he commends the "Wealth of Nations" as "the greatest book extant on political economy, and perhaps on any subject." No man ever appeared in public life more insistent on individual freedom—more enamored of the maxim that the country least governed is best governed—than Mr. Jefferson. Knowing generally that this was so, I was nevertheless amazed to note recently a letter written by Mr. Jefferson to Mr. Madison in 1787, the very year that the convention promulgated the Constitution, in which he says: "Societies exist under three forms sufficiently distinguishable. 1. Without government, as among our Indians. 2. Under governments wherein the will of everyone has a just influence, as is the case in England in a slight degree, and in our states in a great one. 3. Under governments by force. . .

It is a problem not clear to my mind that the first condition is not the best. But I believe it to be inconsistent with any great degree of population." This personal letter, indicative of a tendency of mind, may go beyond a settled conviction, but Mr. Jefferson stated in his first inaugural address in precise and deliberate words, the whole doctrine of the *laissez faire* theory of government: "A wise and frugal government which shall restrain them (the people) from injuring one another; and shall leave them otherwise free to regulate their own pursuits of industry and improvement." Mr. Hamilton, more influential than any other in the actual drafting of the Constitution, and the antagonist of Mr. Jefferson in much of his political philosophy, was none the less opposed to promiscuous governmental activities, and certainly opposed to anything like what in these days is called the "socializing" of government. (Let me, in parenthesis but with all emphasis, say just here that the word "socializing" does not mean at any time in these remarks anything invidious or having to do with "socialism." I mean by "socializing," and kindred words, to indicate the tendency to regard government as primarily an agency for the prevention and cure of social ills, and the betterment of social conditions.) Mr. Hamilton was, above all, a practical lawyer and man of affairs—adviser of and counsel to the men of large business of that day. He believed in a strong government that would protect, and indirectly foster, property rights, and that would enforce contracts—definitely and rigidly. Mr. Hamilton believed in a protective tariff, and in the establishment of a bank; he believed that states should enforce, and not impair, the obligations of contracts; that the government should be strong enough to protect property. But he emphatically did not believe in the regulation of business, or the slightest impairment of property rights, in order to protect the weak against the strong, or to require the efficient to provide for the inefficient.

It is a mistake, too, to assume that the reign, if I may so call it, of John Marshall as Chief Justice of the Supreme Court of the United States for thirty years, had as its direct and immediate effect the extension of the powers of government. When one recalls the list of great cases decided by John Marshall, one realizes that they almost all struck down legislation: Marbury v. Madison[1] asserted the invalidity of any statute, state or federal, passed in contravention of the federal constitution, and asserted the right of the judiciary to determine the question of constitutionality, and, therefore, of validity. Sturges v. Crowninshield, Fletcher v. Park,[2] and the Dartmouth College Case,[3] were all splendid pronouncements, first, that a state may not impair the obligation of a contract between individuals; second, that it may not revoke its own grant, for the grant of a state is itself a contract; and, third, that the charter of a corporation granted by the state constitutes a contract by the state protected by the Constitution of the United States against impairment. Gibbons v. Ogden[4] did not uphold the constitutionality of a federal statute, but held void a state statute that attempted to regulate interstate commerce. Brown v. Maryland[5] likewise held unconstitutional a state statute that interfered with the freedom of interstate commerce. McCulloch v. Maryland[6] upheld the right of Congress to establish a bank, it is true, but its immediate issue was to hold unconstitutional and invalid a state statute that attempted to tax the business of such bank.

All of this is by no means to say that there was not involved in some of these great opinions premonition of a definite extention of federal power. In Gibbons v. Ogden, though it immediately struck down a state statute, there was fashioned and forged the argument and instrument where-

(1) 1 Cranch 137.
(2) 4 Wheat. 122.
(3) 4 Wheat. 518.
(4) 9 Wheat.1
(5) 12 Wheat. 419.
(6) 4 Wheat. 316.

by many a subsequent congressional enactment affecting commerce has been sustained. In McCulloch v. Maryland, too, though its immediate effect was to strike down a state statute, there lies the foundation of the doctrine of the incidental and implied powers of Congress, and its sentences are to this day used in every brief that seeks to maintain the right in legislative bodies to exercise a broad discretion.

These arguments and instruments, forged and fashioned by Marshall, were not, so far as my by no means thorough examination discloses, utilized in any striking way to maintain the validity of an act of Congress that would, but for them, have been of doubtful constitutionality, and there was no distinct sign of increasing governmental activity and power, whether state or federal, until after the civil war.

The significant increase of power, and of activity, actual and probable, of the federal government and the state governments, go hand in hand and interact on each other, so I shall make my discussion to a degree chronological, combining the two rather than attempting to separate them. To my mind two decisions that are very significant in this rapidly accelerated tendency toward increasing governmental activity that we now see, are the case of Veazie Bank v. Fenno[7] and the Slaughter House Cases,[8] both arising out of conditions that followed the civil war.

It is true that from Hamilton's time there had been legislation, enacted by Congress under its power to collect revenue, which had for at least a part of its purpose the protection of American products against foreign competition. But in the Veazie Bank Case there was the definite recognition by the Supreme Court that a tax levied by Congress on the issuance of currency by banks other than national banks was not expected nor intended by Congress to raise revenue, but was expected and intended to prohibit the issuance of such currency, and thus to make more effective the national banking system instituted as a war measure by Secretary of the Treasury Chase, and continued as sound financing and to uphold the market price of United States bonds. Notwithstanding this recognition that the real purpose of Congress was not to raise revenue, the statute levying the tax—but intended to raise no revenue—was held valid. This was judicial approbation of the exercise by Congress of a power conferred on it by the Constitution, when the obvious purpose of such exercise was by no means to accomplish the result that would ordinarily, and presumably as contemplated by the framers of the Constitution, induce the exercise of that power.

The Slaughter House Cases are of equal interest. Of course every lawyer knows, though until the preparation of these remarks I confess that I was not actively conscious that I knew, that it was only after the adoption of the Fourteenth Amendment that state legislatures were forbidden by the federal constitution to deprive persons of life, liberty or property without due process of law. Most, if not all, of the state constitutions contained such provisions, but it was only after the adoption of the Fourteenth Amendment that federal courts were given jurisdiction to annul, as in violation of the Constitution of the United States, state legislation because not constituting due process. It was in the Slaughter House Cases that the first attempt to secure such annulment was made. The case did not involve the rights of those who had been slaves and who had recently been made free men, but involved the contention that a state statute, whose validity was defended as being in the proper exercise of the police power of the state, in fact unreasonably regulated legitimate business activities, created a monopoly abhorrent to our institutions, and deprived the complainants of their liberty and property without due process of law. Justice Miller, delivering the opinion of the court, did not explicitly deny that the Fourteenth Amendment protected all citizens, whether they had theretofore been slaves or not, but he obviously ap-

(7) 18 Wallace 533.
(8) 16 Wallace 36.

proached the consideration of the case with the conviction that the Amendment had for its principal purpose the protection of the recently freed men, and, with respect to some of the provisions of the Amendment, he expressed the doubt as to whether any action of the state not directed by way of discrimination against negroes as a class would ever be held to come within their purview. However that question might be, though, the court was definite, first, that the Fourteenth Amendment did not restrain the states in the exercise of their police power; second, that the phrase "police power" is one incapable of precise definition; and, third, that the police power "extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state."

It is quite unnecessary, and would unduly prolong my remarks, to trace through the various decisions of the Supreme Court of the United States the extension of the power of the federal Congress that seems to me to follow not illogically from the decision of the Veazie Bank Case, and the extension of the power of state legislatures, that seems to me consistent with the logic of the Slaughter House Cases. With the judicial recognition that Congress, in the exercise of a power, may have a purpose having no ordinary relation to the power; with the recognition that the states, by the Fourteenth Amendment, have not in any wise been curtailed in their police powers, and that the police power is such that persons and property may be subjected to all kinds of restraints and burdens to secure, not only the general comfort and health, but the "prosperity of the states," it is by no means to be wondered at that precisely the mental, moral and temperamental equipment that in a legislator induces the introduction and passage of statutes intended to socialize the law—intended to protect the weak and poor against the aggression of the wealthy and strong—intended to equalize property and to put upon the efficient the care of the inefficient—that this same equipment in a judge induces the decision that such statutes are constitutional.

The present world-wide tendency is definitely opposed to the political philosophy of Mr. Jefferson, Mr. Hamilton and their contemporaries. Adam Smith is no longer the popular prophet, and Herbert Spencer is anathema. Government is coming to be regarded by all of us, consciously or unconsciously, as an association to secure the greatest good to the greatest number, instead of an association to preserve order, to enforce contracts, and to interfere no further with the freedom of the individual to regulate his life as he sees fit. Judges are not mere logic-chopping machines; they are inevitably moulded by their environing tendencies of thought. Even if they were simply dehumanized logicians, there is in these two decisions, the Veazie Bank Case and the Slaughter House Cases, logical precedent for what has followed.

In Munn v. Illinois,[9] decided in 1876, the court erected another landmark on its way to making this a land where the persistent will of the majority is controlling, and to which private property must yield: A man erected on his own land a building suitable for the collection and storage of grain; the legislature of Illinois provided a system of maximum rates for such storage; the Supreme Court of the United States upheld that legislation, declaring that the storage of grain was a public purpose; that a government may regulate the conduct of its citizens towards each other, and, when necessary for the public good, the manner in which each shall use his own property; and that when the owner of property devotes it to a use in which the public has an interest he must submit to be controlled by the public for the common good. It is very difficult to say when a public interest begins, and to define logically the line which separates railroads, public service companies and grain elevators on the one hand, from

(9) 94 U. S. 123.

an essentially private business such as manufacturing and dealing in ordinary commodities, on the other. The test is certainly not that a business that has the right of eminent domain shall be deemed to be invested with a public interest so as to be properly regulated, and that one not given that power is to be deemed a private business, to be conducted as the owner sees fit —grain elevators, generally, have no right of eminent domain. The decisions upholding the statutes of Congress, applicable in the District of Columbia, and of the legislature of New York, applicable in the City of New York, delivered in April of this year, provoked violent dissent from a minority of the Supreme Court of the United States, and considerable dissent from newspapers and the bar, but it is hard indeed to draw a distinct, definite and logical line and leave on one side, subject to state legislation, and storing of wheat as a business in which there is a public interest, and on the other side the housing of the population of great cities as a private enterprise, in which the public has no interest, and hence no regulatory power.

In 1887, in Mugler v. Kansas,[10] the court definitely established a doctrine, now a commonplace of the law but up to that time vehemently contested, which makes for easy and inexpensive state enforcement, as law, of the dominant popular opinion. In Bartemeyer v. Iowa,[11] argued at the same time as the Slaughter House Cases, and decided shortly thereafter, a citizen of Iowa had contested the validity of a state statute which prohibited the sale of intoxicating liquors, and intimated, rather than definitely asserted, that he had, before the law went into effect, the particular intoxicating liquor which he had been convicted of selling after the law went into effect; the court unanimously upheld the validity of the statute, but stated that if it had appeared definitely and conclusively that the goods were on hand when the statute was enacted, a very serious question would have been presented, because to prevent the sale of what had been legally produced for sale approached confiscation. Mugler v. Kansas answered that serious question, and under it the brewer found himself, by a statute declared valid, unable to sell the beer which, when he brewed it, might legally be sold; and to operate the brewery which, when he built it, might be legally and properly operated. He was likewise held entitled to no compensation from the state—because the police power is not to be confused with the power of eminent domain, and the constitutional provision that private property taken for a public purpose shall be paid for has no application to private property whose value is destroyed to accomplish a public policy.

None of these cases was ever overruled or modified, but the views and philosophy of our judges have not been distinctly social and non-individualistic always; indeed, they are not as to all judges always so, even yet; and statutes passed by states in the exercise, presumably, of their police power, have been held to contravene the Fourteenth Amendment, and congressional enactments, notwithstanding the Veazie Bank Case, have been held invalid, in some instances, when they were too palpable in their invasion of that part of our dual system of government reserved to the states.

During the ten or twelve years last past, though, the courts are inevitably moving with the thought of the day. In 1904 the Supreme Court of the United States held invalid a New York statute that fixed maximum hours in which men could work in bakeries; four of the justices dissented, but Justice Holmes was alone in a very striking dissenting opinion: "The Fourteenth Amendment," he said, "does not enact Mr. Herbert Spencer's social statics—Every opinion tends to become a law. I think that the word 'liberty' in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe

(10) 123 U. S. 623.
(11) 18 Wallace 129.

fundamental principles as they have been understood by the traditions of our people and our law." In 1911, only seven years after the court had decided this New York statute unconstitutional over the dissent of Justice Holmes, Justice Holmes delivered the unanimous opinion of the court in State Bank v. Haskell,[12] and in this unanimous opinion he reiterated the doctrine that seven years before he had stood alone in announcing: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare—if, then, the legislature of a state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it." The Court of Appeals of New York declared the much discussed housing statutes valid before the Supreme Court of the United States had passed on the particular question, and a consideration of opinions such as this, delivered by the highest court, induced the New York Court of Appeals to say: "The legislative or police power is a dynamic agency vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirements of due process."

Precisely as has grown in size and definiteness, if I may so express it, this judicial conception of the police power of the state, so there has grown the judicial conception of the validity of congressional action, under some one of its delegated powers, to effect a police purpose, and the further conception that a police purpose is not necessarily a purpose connected with the health or good order of society, but, as applied to the nation as well as to the state, it is now the "strong and preponderant opinion" of the people. So also has grown the activities of federal legislation in this direction. Congress having eliminated state bank currency by the exercise of the power of taxation, eliminated under the same power oleomargarine colored to look like butter, and curbed the evil of drug addiction. By its power over interstate commerce it provided for purity of food; lent its aid to stamping out immorality; and required the railroads to pay ten hours' wages for eight hours work "in an emergency"—which emergency was a threatened strike of railroad employees. Under the interstate commerce clause it attempted to regulate the hours that children shall work in factories, which attempt was made unsuccessful by the courts because too palpably an invasion of the domain of the states, and on a subject about which the states have already legislated; having failed under the interstate commerce power to impose upon the individual and upon each state the congressional view as to how long a child shall work in a factory, it attempted to achieve precisely the same result under its taxing power.

With the right in Congress to levy income taxes without apportionment, and with its right to declare any vocation or activity a privilege and to levy privilege taxes, and with its right to levy inheritance taxes, and with its right in all of these to graduate the rate so that the rich pay on a higher basis than the poor, and the rich estate on a higher basis than the poor estate, and corporations different rates dependent on the percentage of profits made on the original investment,—with all this, it is easy to see that the preponderating and definite public opinion as to limitations of wealth in this country will ultimately be made effective.

It is not only, nor perhaps principally, that the deliberate purpose to limit wealth will be operative: It must be apparent to all that, with the recognition that income taxes are a feasible means of revenue, and that rates of sur-tax are illimitable, there has come an inclination to spend money collected by government lavishly and for many sorts of social purposes: roads are to be built, educational and eleemosynary institu-

(12) 219 U. S. 104.

tions are to be heavily endowed, farm loans are to be made, foreign trade is to be fostered, perhaps, as in some European countries, maternity is to be subsidized and old age made care-free—all at governmental expense. All of these expenditures and experiments serve but to take from the efficient and thrifty his current or accumulated excess rewards, not necessarily because it is bad for the common weal for him to enjoy them, but because it is, or at least, is conceived to be, better for the common weal for the money to be spent, and there is nowhere else to get it.

In the meantime, state statutes for the general welfare, or the greatest good to the greatest number, are passed by every session of the state legislatures, and held valid when they reach the highest court. The Oregon minimum wage law has been sustained; the Court of Appeals of New York in 1911 held a statute unconstitutional that required the employer to pay for injuries not caused by his negligence, but that decision is not the law of to-day, and state after state is passing laws requiring employers to compensate employees for their injuries, even in instances when the injury was caused by the negligence of the employee himself, and their validity is fully established; the law laid down by the Supreme Court in 1904 declaring invalid the New York statute limiting the hours of labor of bakers is not the law now, and it is the state that determines, if it so elects, how long a laborer may work, with what currency he shall be paid, and what shall be the minimum wage; finally, the state determines that in a crowded city the tenant shall continue to occupy his leased tenement though contrary to the terms of his written lease, and though another would-be tenant stands ready to pay more rent.

What shall we do about this trend in legislators to use the police power of the states, and the powers conferred on Congress, to achieve social ends? What shall we do about the growing disposition of the courts to maintain such legislation? In the first place, it is my modest suggestion that, whatever we may think of such, there is very little that we individually or in association can do. I said, in opening, that I was not sure that we lawyers are influential in such a matter; on second thought I am tempted to say that I am quite sure that we are not at all influential. In every country, and in every institution—in church and state—there is a distinct tendency in the same direction—the recognition of social duties as opposed to individual interest, even if the individual interest is the saving of one's own individual soul. In such matters as the simplification of legal procedure, putting on a correct basis the rights and liabilities of married women, providing for easy but safe corporate organization, we lawyers are influential; but in the face of the tendency I now refer to, and with respect to the whole subject of my remarks, I have no temptation to deliver an exhortation, because, primarily, I believe it would be futile even if it should be persuasive. My attitude of mind is that of an astronomer who finds an absorbing interest in watching the course of the stars, but does not for a moment conceive that he can by a hair's breadth influence or vary their course.

Whether one welcomes the unmistakable tendency, or is disposed to mourn it, depends very much on his constitution of mind, and on the circumstances of his environment. As lawyers, who are accustomed to seek to ascertain from a written instrument the thoughts and conclusions of the parties to that instrument, it gives us an intellectual distress sometimes, to see read into the Constitution of the United States meanings that we know to be not only outside the purpose of the parties to the instrument, the makers of the Constitution, but directly opposed to their views of the powers they had given Congress and left to the states, and their views of the limitations they had put on those powers. It makes one smile, too, perhaps in a sardonic way, to hear from the same lips praise of the makers of the Constitution, and praise of the Constitution itself as "the most won-

derful work ever struck off at any given time by the brain and purpose of man," and, in the same breath, advocacy of the wisdom and validity of state and federal legislation directly opposed to the philosophy and purpose of these men and their work.

On the other hand, would our republic have survived an interpretation and enforcement of the Constitution according to the evident political philosophy of the framers thereof, and according to some of the earlier inclinations of the courts, and according to the views of some of us who take what seems to me sometimes a pharasaic pride in being "conservative?" The selfish aggressiveness of strong men needed no restraint when we were a scattered and primitive people; this selfish aggressiveness was, perhaps, the principal factor in much of the growth of our industrial life. In present conditions, though, with the power of the strong men enormously reinforced by our enlarged commerce, by our banking facilities, by our railroads and other mechanical improvements, could there survive a republic which merely preserved order and enforced contracts—and otherwise left its citizens to sink or swim, to accumulate vast wealth or starve, dependent upon their varying ability and resourcefulness, and, perhaps, cunning? It is a far cry from what was in the mind of the makers of the Constitution that Congress, under its power to regulate commerce, may say to a corporation, legally formed under the laws of a sovereign state, that it may not acquire stocks in various railroad companies, or that it may not acquire as many factories for the manufacture of an article of merchandise as it sees fit; but perhaps it is well for the permanency of property itself that the courts have finally held that there is such power in Congress. The employer and the employee are theoretically equal in their rights and dignity, and assuming, as we must assume, that the right to contract is a part of the liberty that is protected by the Fourteenth Amendment, it may be argued that a law that prevents the agreement between employer and employee as to hours of labor, or whether that labor shall be compensated in money or merchandise from "company's stores," or whether payment shall be made weekly or monthly, or whether the employee shall assume the risk of personal injury incident to his employment, infringes the constitutional right of the employee, as well as the employer. But would it have been fortunate if the courts had so held, and so left the employee, in fact if not in theory, at the mercy of the employer? It is true that the law of diminishing returns, which, without legislation, operates to reduce aggregate revenue when rates are too high, places a limit on rates that may be permanently profitably charged by public service companies, but would it be well that the prices and charges fixed by the owners of public utilities, who inevitably and properly enjoy a quasi-monoply, should be regulated only by that law and their own self-interest?

It is true, at least from my point of view, that regulatory statutes that go too far, that tax laws that take too large a percentage from the incomes of the rich, that laws that in an emergency annul subsisting contracts between employer and employee or landlord and tenant, are likely eventually to defeat their own purposes and to work toward social ill rather than toward social good. We are not, and never shall be, in a position where we can dispense with the service rendered by the strong and energetic *entrepreneur*, the pioneer, the builder of business. The community prospers by the daring of men who make sometimes large losses and sometimes large profits; these men will cease their daring if they must suffer alone all their losses, and pay to the government, in the form of taxes, more than half their profits. Money will be invested in large manufacturing plants even though the law provides for reasonable hours of labor and for paying of wages in current coin, but it will not be invested if labor is made the complete dictator, whether by over-regulation in the interest of labor or by exempting trades unions

from ordinary legal restraints. The supply of houses will inevitably be curtailed if leases are to be, by retroactive legislative enactment, left binding upon the landlord and made inoperative against the tenant. These considerations, though, are entirely consistent with the view that legislation, wise or unwise, having for its apparent or ostensible purpose social betterment, when enacted, will be valid, and that the dominant opinion of the people of this country on these questions tends to become a law.

When we turn from this departure from the "ancient landmarks," in efforts of the legislature, declared valid by the courts, to readjust business, to regulate habits and conduct, and to reduce the inequalities of fortune, we see little inclination in legislators, and none in the courts, to depart from the doctrines of the founders of our government. The judges who seem to go very far to maintain the validity of a regulatory statute, are nevertheless firm as adamant, sometimes going beyond the majority of the court, in maintaining the right of the citizen to the protection of those clauses of the federal constitution that protect him in the freedom of his person and freedom of speech. The bill of individual rights affirmatively secured to the citizen by eight of the first amendments to the Constitution of the United States, is unimpaired. Indeed, it is to be noted that the leaders of the thought of the bar as to the validity and propriety of laws that involve the highest development of the social work of government—those who to some of us seem to have no wholehearted love for the Tenth Amendment which reserves to the states powers not expressly granted to the federal government, and still less for the Fifth Amendment and the Fourteenth Amendment, in their protection of the property rights of citizens,—men of great ability and culture, like Mr. Roscoe Pound and Professor Chaffee—are the leaders likewise in the contention that the constitutional guaranty of freedom of speech must not be curtailed even in time of war and danger, and even as applied to the promulgation of views most violently antagonistic to our institutions. In spite of the interesting book of Professor Chaffee, recently published, I do not think that freedom of speech is imperilled by the recent decision of our courts.

Notable declarations have been made by the courts maintaining in their full vigor other constitutional provisions intended for the protection of the citizens: In February of this year a unanimous Court declared invalid a criminal statute passed by Congress in the exercise of its war powers, that forbade an unjust or unreasonable charge by those dealing with the necessities of life, because the statute fixed no standard of guilt, but left such standard to the varying views of different courts and juries. On the same day, and again unanimously, the Court gave effect to the constitutional right of the citizen to be secure against unreasonable search and seizure, by refusing to permit the introduction into evidence, for any purpose, of papers that had been improperly seized by a government officer. Such decisions should be most cheering to patriotic men, whether of individualistic or social trend of thought. As Senator Root has said, in his characteristically trenchant and effective way: "Because of the fact that these secondary rules do not themselves declare a principle, that many of them appear to be technical, that many of them appear to be mere rules of procedure and evidence, that occasionally their assertion does not appear to promote the justice of the particular case,—they are often regarded with disfavor by the thoughtless. If the agents of government are permitted to override these rules when they think justice of the particular case requires it; if the rule is not to be maintained as a rule inviolate in every case, then there is nothing left but the judgment of the officer in every case, and the protection of all citizens alike against arbitrary power is swept away." If these rules, called by Senator Root "secondary," although of supreme importance, only because they are usually preceded by some declaration of a general principle of justice and liberty that is called

"primary"—these rules set out in detail in the first amendments to the Constitution of the United States—if these are maintained in letter and in spirit against any encroachment, then we may hope that the tendency towards socializing our government, which undoubtedly up to the present has brought some good and some evil to the commonwealth, may, by the good sense of the electorate and by the wisdom of its leaders, be kept within reasonable and salutary bounds.

JUNIUS PARKER.

New York City.

AUTOMOBILES—DUTY OF DRIVER

LAMBERT v. EASTERN MASSACHUSETTS ST. RY. CO.

134 N. E. 340.

Supreme Judicial Court of Massachusetts, March 2, 1922.

A woman riding with her husband in an automobile driven by him which skidded and turned over on street car tracks in front of an approaching car could not recover if she negligently abandoned the exercise of her own faculties and trusted entirely to his care and caution, and his negligence caused or contributed to the accident.

Fred L. Norton, of Boston, for plaintiffs.

E. P. Saltonstall, of Boston, for defendant.

CROSBY, J. These are two actions of tort: The first, to recover for personal injuries received by the plaintiff on July 11, 1919, in consequence of being struck by one of the defendant's cars after the automobile in which she was riding had upset upon the defendant's car tracks; and the second, by her husband, who was operating the automobile at the time of the accident, to recover for medical and nursing expenses incurred by him in the treatment of his wife on account of the injuries sustained by her, and for damages to his automobile caused by being struck by the car.

The accident occurred on Osgood street, a public way in North Andover. The street runs in an easterly and westerly direction, and at the place of the accident had a macadam or tarvia surface on each side of which for a few feet was loose gravel. The defendant maintained a single track on the extreme northerly side of the street beyond the edge of the tarvia surface. On the day of the accident the plaintiffs were traveling on the street in an easterly direction in an automobile driven by Mr. Lambert, his wife sitting on the seat beside him; when they reached a point nearly opposite a lane described in the record the automobile suddenly skidded to the left, partly across the street railway track, and tipped over; while in that position a car of the defendant traveling in a westerly direction struck the automobile and Mrs. Lambert.

At the close of the evidence the plaintiffs requested the presiding judge to give six instructions. The fifth was given in substance, and the second and sixth are waived, thus leaving for consideration the first, third and fourth.

The first request was that—

"The mere skidding of the car was not an occurrence of such uncommon or unusual character that unexplained the jury could say it furnished evidence of the plaintiff's negligence."

The court refused so to instruct the jury, but did instruct them that—

"The mere skidding of his automobile, unexplained, is not necessarily evidence of negligence on his part."

The request was a correct statement of the law pertinent to the issue of the conduct of the driver of the automobile, and should have been given; as modified by the court, it was not in substance or effect what was asked for and to which the plaintiffs are entitled. The mere fact that the automobile skidded was not evidence of negligence; this court has so held in several cases. Williams v. Holbrook, 216 Mass. 239, 242, 103 N. E. 633; Loftus v. Pelletier, 223 Mass. 63, 65, 111 N. E. 712; Kelleher v. Newburyport, 227 Mass. 462, 464, 116 N. E. 806, L. R. A. 1917F, 710. If there was evidence to show that the automobile skidded by reason of negligence of the driver, it could have been found that such negligence caused or contributed to the accident, but such evidence did not make the request inapplicable; the request was based on the assumption that skidding of the automobile was unexplained and unaccounted for. The instruction given that the skidding of the automobile was not necessarily evidence of negligence did not protect the rights of the plaintiffs, as the jury might have found it to be evidence of negligence, although wholly unexplained. As it did not accurately inform the jury upon an important issue, and as the instruction asked for was pertinent to a correct determination of that issue, the exception to the refusal to give it must be sustained. McGrath v. Wehrle, 233 Mass. 456, 124 N. E. 253.

The third request that "There is no evidence of contributory negligence on the part of Louisa

M. Lambert" was properly refused. It is plain that she could not recover if she was guilty of contributory negligence. If the jury found that in the exercise of common prudence she ought to have given warning to her husband of carelessness on his part, which she observed or ought to have observed in the exercise of due care for her own safety, and that she ought to have warned him that he was driving at too great a rate of speed in view of the condition of the surface of the street, or that in the exercise of reasonable care she should have seen the approaching car and directed his attention to it and that she failed to do so, she would not be entitled to recover. Nor could she recover if she negligently abandoned the exercise of her own facilities and trusted entirely to the care and caution of her husband, and his negligence caused or contributed to the accident. The instructions given to the jury on this branch of the case were full, clear and accurate. Shultz v. Old Colony St. Ry., 193 Mass. 309, 323, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; Miller v. Boston & Northern Street Ry., 197 Mass. 535, 83 N. E. 990.

The plaintiffs' fourth request is:

"There is no evidence that the speed of the automobile before it skidded was such as to establish negligence on the part of Clarence E. Lambert."

This request properly could not have been given. The uncontradicted evidence was that the automobile was being operated at a speed of 12 miles an hour just before the accident. The jury could have found that, owing to the wet and slippery condition of the tarvia surface of the street, the speed was unreasonable and improper; such a finding would have been evidence of negligence of the driver.

As the plaintiff's first request should have been given, the entry must be:

Exceptions sustained.

NOTE—*Right of Occupant of Automobile to Rely Upon Driver For Exercise of Due Care.*—One riding as a guest or passenger in an automobile, while not chargeable with the negligence of the driver, is required to exercise reasonable care for his own safety. This duty may include watching out for street cars, railroad trains, and other vehicles and warning the driver thereof, or it may consist of the duty to protest against negligent operation by the driver, or even the duty to attempt to alight from the vehicle in certain circumstances. However, the duty placed upon the occupant, while it is that of reasonable care, does not require him to take the same precautions that it requires of the driver. A person of ordinary prudence riding with another will naturally put a certain trust in his judgment, and will rely in some measure on the assumption that he will use care to avoid the ordinary dangers of the road. Pigeon v. Railway Company, 230 Mass. 392, 119 N. E. 762.

"In order to conclusively charge a mere passenger with contributory negligence in failing to see an approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety." Carnegie v. Railway Co., 128 Minn. 14, 150 N. W. 164.

"One riding as a passenger or guest may not place his safety entirely in the keeping of the driver, but he must exercise due care and reasonable care for his own protection and safety." Hines v. Johnson, 264 Fed. 465.

"One occupying a vehicle as a guest cannot rely upon the care and vigilance of the driver to the extent of relieving himself from the exercise of reasonable precautions for his own safety." Stern v. Nashville Int. Ry., 221 S. W. 192.

In the case of Beall v. Kansas City Railways Co., Mo., 228 S. W. 834, it appeared that the plaintiff was riding as an invited guest on the rear seat of an automobile, and that there were two persons in front of her in the front seat. She took no precautions whatever against danger arising from the operation of the street car line, and the automobile was struck by a car. However, it appeared that any attempt on her part would have been futile, because the driver saw the car before she had an opportunity to see it. and that she did not see the car until her hostess, who was seated on the rear seat with her, called out to the driver, and when she did see it, it was only a few feet away and too late for her to do anything to save herself from injury. It was held that she was not guilty of contributory negligence as a matter of law.

HUMOR OF THE LAW.

"Of course, you understand," said the lawyer for the prosecution, as he shook hands with the alienist who had testified for the defense, "of course you understand that I didn't really mean the aspersions I cast in court on your ability to tell whether or not a person is crazy?"

"Certainly," replied the alienist with thinly veiled sarcasm. "And I don't mind telling you that after I heard you talk a while you greatly aroused my professional interest in your own mental condition."—*Birmingham Age-Herald.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles**—Collision.—Where a collision between defendant's truck and a truck driven by plaintiff's minor son, under the age of 18 years, who had no driver's license, as required by Act April 27, 1909 (P. L. 266), § 4, was due to the negligence of defendant's driver, there was no causal relation between the minority of plaintiff's son and the death of plaintiff's husband, who was riding on the truck, and the fact that he was riding with an unlicensed minor under the age of 18 did not defeat a recovery for his death.—Scorsoni v. Pittsburgh Provision & Packing Co., Pa., 116 Atl. 154.

2.——Collision.—In an action for injury, causing death from colliding with defendant's auto, where the evidence showed that defendant owned, but did not drive, her auto, but that, when used for her pleasure, her husband acted as her agent and chauffeur, where the wife for her own pleasure accompanied her husband on a business trip, it cannot be said as a matter of law that he was not performing some service for her at the time of the collision.—Allen v. Holler, N. Y., 192 N. Y. S. 351.

3.——Imputable Negligence.—Negligence of driver of automobile is not imputed to one in his car riding at his invitation and as his guest, in the absence of evidence to show that such guest knew that the car was being negligently driven.—Eads v. Tiede, S. D., 186 N. W. 823.

4.——Liability of Owner.—Where defendant's chauffeur, after taking at defendant's directions defendant's guest to a station, returned the car to defendant's home, his subsequent taking of the car without authorization for a trip of his own, was tortious, and its use on such trip, whereon he collided with plaintiff's car, was not on defendant's business, but solely on his own, so that defendant was not liable.—Bloodgood v. Whitney, N. Y., 192 N. Y. S. 383.

5.——Negligence.—Where an automobile driver aproaching an intersecting street which was 90 feet wide between the property lines, at a speed of 12 miles an hour, looked for autobiles on the intersecting street when he could see a distance of 200 feet, and there was an ordinance prohibiting a greater rate of speed than 20 miles an hour, he and one riding with him were not negligent as a matter of law in proceeding to cross without looking again when he would have been able to see a greater distance as he would have passed out of the sphere of danger before any car traveling at a lawful rate of speed could have reached the intersection.—Dauber v. Josephson, Mo., 237 S. W. 149.

6.——Negligence.—While plaintiff was driving along a street in the village of Jackson, he discovered that the endgate of his wagon had fallen off and was lying in the middle of the street two or three hundred feet behind him. He ran back to the endgate, and, while picking it up, was struck by defendant's automobile. He had seen the automobile coming toward him along the center of the street, but paid no attention to it, as the driver had ample room to avoid him by turning to the right side of the street. Held, that whether he was guilty of contributory negligence was a question for the jury.—Shearer v. Dewees, Minn., 186 N. W. 793.

7. **Bankruptcy**—Discharge.—Evidence in support of objections to a bankrupt's discharge on the ground that he obtained goods on materially false statements in writing held insufficient to bar his discharge under Bankruptcy Act, § 14b, where bankrupt was the only witness, and testified that the statements were written by the creditor's salesman and signed by him without reading, and that the statements made by him as to amounts and values were according to his best information, and that some of his answers were not correctly entered.—Acme Harvesting Mach. Co. v. Bennett, U. S. C. C. A., 277 Fed. 425.

8.——Lien.—Where a seller of flour delivered it to the bankrupt for the purpose of resale in the usual course of business, the seller could retain no lien thereto, notwithstanding an unrecorded contract whereby the seller sought to retain title.—Valier & Spiers Milling Co. v. Foote, U. S. D. C., 277 Fed. 519.

9.——Lien.—Where shoes were sold to a retail dealer, who subsequently became bankrupt, the seller held not to have a lien superior to the claim of the trustee in bankruptcy, under Code Miss. 1906, § 3079, conferring a purchase-money lien on personal property while in the hands of the first purchaser, or one deriving title or possession through him with notice that the purchase money was unpaid, where the sale was made to the retail dealer for the purpose of resale with the knowledge and consent of the seller.—In re Wright & Weissinger, U. S. D. C., 277 Fed. 514.

10. **Banks and Banking**—Exchange.—A state bank, not a member of the Federal Reserve Bank, held entitled to charge its customary exchange on remittances to the reserve bank of the district, and a practice of the reserve bank to send checks on the state bank received by it for collection to the drawee bank indorsed "for collection only and remittance in full without deduction for exchange," and on their return unpaid to return them to its correspondents, advising them in effect that the checks were dishonored, held unauthorized, and enjoined, where it appeared that such practice was adopted for the purpose of coercing the state bank.—Brookings State Bank v. Federal Reserve Bank, U. S. D. C., 277 Fed. 430.

11.——Fraud.—In an action against a trust company on a certificate of deposit, the defendant should not be allowed to answer, alleging a fraud not directly perpetrated on the defendant, but on a third party, and that it was financially interested in the matter, which was ultra vires the corporation.—Green v. Commercial Bank & Trust Co., U. S. D. C., 277 Fed. 527.

12.——Guaranty.—Where a national bank to which a contractor had assigned the amounts to become due under the contract as security for advances made by the bank, guaranteed payment by the contractor for supplies furnished to enable him to complete the contract, and became entitled under its assignment to an amount exceeding the guaranteed purchase price, it is liable to pay the guaranteed price of the goods from which it has received a benefit in excess of its guaranty, even though its guaranty was invalid.—First Nat. Bank of Aiken v. J. L. Mott Iron Works, U. S. S. C., 42 Sup. Ct. 286.

13.——Tax on Stock.—The fact that a bank's officer may have been mistaken as to the validity of a statute when advising the assessor to assess its stock does not estop the bank to question the validity of the tax assessed under Laws 1915, c. 31, which has been declared unconstitutional.—Union Bank & Trust Co. v. Moore, Mont., 204 Pac. 361.

14. **Bills and Notes**—Contemporaneous Contract.—A note and contract, being contempor-

aneous instruments relating to the same subject-matter, should be construed together to determine the liability of the maker of the note.—Nichols v. Lane, N. Y., 192 N. Y. S. 362.

15. **Carriers of Passengers** — Negligence. — Where a subway station platform was not overcrowded, when a passenger was injured in boarding a car, negligence contributing to the accident cannot be predicated on failure to have sufficient guards there, as in such case they would not be necessary.—Commerford v. Interborough Rapid Transit Co., N. Y., 192 N. Y. S. 349.

16. **Charities**—Payment to Hospital.—An institution does not lose its charitable character because those recipients of its benefits who are able to pay are required to do so, where no profit is made, and the amounts received are applied to furthering its charitable purpose, and its benefits are refused to none on account of inability to pay therefor.—Hart v. Taylor, Ill., 133 N. E. 857.

17. **Commerce** — Intrastate. — Transportation Act 1920, § 402, pars. 18 to 20, which were added as amendments to Interstate Commerce Act, § 1, and which authorized the Interstate Commerce Commission to permit railroads to abandon the operation of their lines do not authorize the Commission to permit a railroad which owned only one line, situated wholly within a single state, to abandon its line so far as intrastate commerce was concerned.—State of Texas v. Eastern Texas R. Co., U. S. S. C., 42 Sup. Ct. 281.

18.——Oil Inspection Law.—Gen. Code Ohio §§ 844-868, as amended by 105 Ohio Laws, p. 309, providing for inspection of petroleum products and fixing fees to be charged therefor, which aggregated in the first year 63 per cent greater than the inspection costs, and have since constantly increased, until, in each of the two years ending in 1920, they were more than double such cost, no distinction being made between oil produced in the state and that brought from other states, held invalid, as imposing an unlawful burden on interstate commerce, in violation of article 1, §§ 8 and 10, of the Constitution.—Cleveland Refining Co. v. Phipps, U. S. D. C., 277 Fed. 463.

19.——Purchase of Revolver.—In prosecution for violation of ordinance by purchasing a revolver without a permit, where the evidence showed that the purchase, if any, was by mail in New York, whence the revolver was mailed C. O. D. to Chicago, where the price was collected by the mail carrier, conviction could not be sustained, as it violated the constitutional provision as to regulation of commerce between the states.—City of Chicago v. Di Salvo, Ill., 134 N. E. 5.

20.——Taxation.—The United States Supreme Court having held that courts look to the substance and effect rather than the form, of taxation of intangible property of domestic corporations engaged in interstate or foreign commerce, in determining whether interstate commerce is interfered with, in violation of Const. U. S. art. 1, § 8, cl. 3, state taxation of such property located in the state at its actual value does not constitute such interference, though the property derives its value from interstate and foreign commerce, but a different rule prevails as to a foreign corporation, the business of which in the state is exclusively interstate commerce.—Schwab v. Richardson, Cal., 204 Pac. 396.

21. **Constitutional Law** — Curative Act. — Where there is no constitutional prohibition, the Legislature may validate by curative act any proceeding which it might have authorized in advance.—Alatalo v. Shaver, S. D., 186 N. W. 872.

22. **Contracts** — Rescission. — Attorneys who had agreed to pay witness' expenses incurred at place of trial were liable for the actual expense incurred, and not for amount which would have been incurred if witness have lived at a more expensive hotel.—Stoedter v. Turner, Mo., 237 S. W. 141.

23. **Courts**—Jurisdiction.—Under Const. Kan. art. 3, § 6, and Gen. St. Kan. 1915, §2957, relative to the powers and jurisdiction of the Kansas district court, a suit to enjoin defendants from calling a general strike and causing a cessation of work in coal mines pursuant to a conspiracy, was wholly independent of the Kansas Industrial Relations Act, and the district court in entertaining it did not depend on the constitutionality of that act for its jurisdiction, or for justification for its injunction, and the state Supreme Court having so held, the constitutionality of such act is not involved, so as to support a writ of error from the federal Supreme Court.—Howat v. State of Kansas, U. S. S. C., 42 Sup. Ct. 277.

24.——Nineteenth Amendment—A suit by a private citizen to have the Secretary of State enjoined from proclaiming the ratification of the Nineteenth Amendment to the Constitution, begun before the ratification was complete, and the Attorney General restrained from enforcing a bill then pending in Congress to give effect to the amendment, is not a "case," within Const. art. 3, § 2, conferring judicial power on the federal courts, and cannot be maintained, since the general right of a citizen to require the government to be administered according to law does not entitle him to institute in the federal courts a suit to secure a determination whether a constitutional amendment or a statute about to be adopted will be valid.—Fairchild v. Hughes, Secretary of State, U. S. S. C., 42 Sup. Ct. 274.

25. **Divorce**—Expense Money.—Where the affidavit in support of a wife's motion for expense money showed her requirements would be $2,000, an allowance of $7,500 must have been intended to provide for the payment of past expenses, which may not be done.—Stillman v. Stillman, N. Y., 192 N. Y. S.

26. **Electricity**—Negligence.—In an action for wrongful death caused by coming in contact with broken high tension wire, an instruction that plaintiffs were entitled to recover if the wire coming in contact with trees had become uninsulated and "liable" to break held not erroneous, if requiring defendant to guard against the bare possibility of breaking; the word "liable" being used as synonymous with the word "likely."—Adams v. Moberly Light & Power Co., Mo., 237 S. W. 162.

27. **Eminent Domain**—Compensation.—Vaults constructed by the abutting owners under the sidewalks under a permit from the city, which was revocable for failure of the owners to comply with its condition, are easements and privileges in the nature of property for the taking of which compensation must be paid under Rapid Transit Act, § 39, as amended by Laws 1912, c. 226, requiring compensation for any real estate, rights, terms, and interests therein, and any and all rights, privileges, franchises, and easements which it is necessary to extinguish or acquire, and defining property as including any such real estate and any rights, privileges, franchises, and easements.—In re Low, N. Y., 192 N. Y. S. 366.

28. **Estoppel**—Title to Highway.—In a suit to remove an obstruction of a highway caused by abutments supporting an overhead railroad track, the fact that the railroad company by mistake paid taxes on the land on which the abutments stood, or the error of the assessors in assessing the taxes, if made, cannot operate as an estoppel against the public and vest title to the land in defendant, which was a trespasser thereon.—City of Mt. Vernon v. New York, N. H. & H. R. Co., N. Y., 133 N. E. 900.

29. **Frauds, Statute of**—"Sale."—Agreement to deliver a cable transfer of foreign exchange held not a sale of an existing credit for the amount involved within statute requiring written evidence of its terms.—Equitable Trust Co. v. Keene, N. Y., 133 N. E. 894.

30.——Written Contracts.—Though Acts Mass. 1908, c. 237, pt. 1, § 4, requiring written contracts of sale of goods, provides that it shall not apply to goods "specially manufactured" by the seller for the buyer, and not suitable for sale to others in the ordinary course of the seller's business, it applies to a sale of machinery of a standard type manufactured by the seller of less value to others than the buyer, and the contract must be in writing.—Saco-Lowell Shops v. Clinton Mills Co., U. S. C. C. A., 277 Fed. 349.

31. **Insurance**—Breach of Warranty.—Where an accident insurance policy was renewed on agreement that it was issued in consideration of the truthfulness at that date of the warranties in the original policy, one of which was that no accident policy issued to insured

had ever been canceled, that a policy in another company had been canceled after the date of the original policy was not a breach of warranty, where the breach claimed was not based on the renewal policy, but on the original.—Bennett v. Standard Acc. Ins. Co., Mo., 237 S. W. 144.

32.——False Statements.—Where beneficiary certificate was issued by the society and accepted by the member, upon the express warranty that statements in application, made a part of the certificate, as to member's consultation of and treatment by physicians during specified period, were true, the falsity of the statements precluded recovery.—Beckman v. National Council of Knights and Ladies of Security, Mont., 204 Pac. 487.

33.——Foreign Corporation.—To obtain the benefit of Rev. St. 1919, § 6413, exempting fraternal beneficiary associations from the operation of laws relating to general insurance contracts, a foreign corporation must plead and prove not only incorporation as a fraternal society as defined by section 6398, in the state of its origin, but that it is licensed to do business in this state.—Harris v. Switchmen's Union of North America, Mo., 237 S. W. 155.

34.——"Forthwith."—The word "forthwith" or "immediate," in theft policy, with respect to time of notice of loss, means within a reasonable time, and, unless the lapse of time is so long as to be obviously a noncompliance with the contract, the question of whether the notice was given within a reasonable time is one for the jury.—Falls City Plumbing Supply Co. v. Potomac Ins. Co., Ky., 237 S. W. 376.

35.——Hazardous Occupation.—In view of Acts 1911, p 700, § 20, where, after death of member of fraternal beneficiary society, the clerk of the society's local camp for the first time learned from the member's widow that he had changed his occupation to one of a hazardous nature, requiring notice and additional premium, the clerk's friendly advice to the widow that she remit the extra premium to the society's attorney at the home office, and that if it was accepted it would be all right, was not a waiver of the policy provision requiring notice of change and payment of additional premium; her tender being promptly returned by the home office.—Sovereign Camp, W. O. W. v. Tucker, Ala., 90 So. 801.

36.——Misrepresentations.—A certificate of a beneficial association entitling member to participate in "the mortuary fund to the amount of one full assessment, for all members in good standing in the association, not to exceed one thousand dollars," held not a contract of insurance "on the assessment plan," that, by virtue of Rev. St. 1919, § 6164, would make section 6145 binding, and require it to deposit in court premiums paid in order to set up defense of misrepresentation.—Wilson v. Brotherhood of American Yeomen, Mo., 237 S. W. 213.

—37. **Intoxicating Liquors**—Search and Seizures.—A warrant for search of premises and seizing of intoxicating liquor, referring to the premises only as No. 9 Delaware street, held not subject to objection, where the officer searched the whole premises of the hotel company, the street numbers of which run from 7 to 17; No 9 being probably its general entrance.—In re Holcomb, N. Y., 192 N. Y. S. 407.

38. **Landlord and Tenant**—Fixtures.—Under a lease providing that alterations and improvements, "except movable office furniture put in at the expense of the tenant," should remain a part of the premises, sectional and interchangeable partitions installed by the tenant are deemed a part of the "movable furniture," and on removal by the tenant without injury to the building became his property.—Century Holding Co. v. Pathe Exchange, N. Y., 192 N. Y. S. 380.

39.——Housing Laws.—The New York emergency housing laws form a consistent interrelated group of acts, obviously adopted as a resort to the police power to promote public welfare, and the emergency which caused their enactment, resulting from the shortage of houses in the large cities of New York state at the close of the war, was sufficient to sustain an appropriate resort to the police power to deal with such emergency.—Edgar A. Levy Leasing Co. v. Siegel, U. S. S. C., 42 Sup. Ct. 289

40.——Reasonable Rent.—In ascertaining a reasonable rent, the rent commission should first determine the fair market value of the property, considering original cost, cost of reproduction, and rental value, then determine the gross rentals demanded, and then compute the operating expenses and deduct them from the gross rental, which will give the net rental from which a percentage of income on the fair market value can be computed.—Karrick v. Cantrill, U. S. D. C., 277 Fed. 579.

41. **Limitation of Actions**—Due Process.—Assuming that a state statute creating a levee district and providing for the conveyance to its board of commissioners, on request, of lands within the district belonging to the state, constituted a contract and took from the state the right to otherwise dispose of the lands, where the state subsequently gave a patent to other persons, a statute requiring actions to vacate and annul any patent to be brought within six years of its issuance or within six years from the passage of the act, if issued before its passage, did not violate the due process or contract clauses of the United States Constitution, as statutes of limitation do not lessen property rights or impair the obligation of contracts, but only require that they be asserted within a prescribed time.—Atchafalaya Land Co. v. F. B. Williams Cypress Co., U. S. S. C., 42 Sup. Ct. 284.

42. **Master and Servant**—Chauffeur's Negligence.—Defendant, who on reaching his home ordered his chauffeur to return in four hours, held liable for the negligence of the chauffeur driving on an errand of his own a couple or hours before he was to return.—Campbell v. Warner, N. Y., 192 N. Y. S. 404.

43.——Rule of Haste.—The rule of haste, as related to the hazards incident to the operation of a railroad, does not apply where the work consists in loading and unloading mail bags during the stop made by a train at a railroad station.—Jirmasek v. Great Northern Ry. Co., Minn., 186 N. W. 814.

44. **Mines and Minerals**—Lease.—Lessors, to cancel oil lease for lessee's failure to develop as required by the lease, must make demand on lessee to develop the property within a reasonable time; the question of what constitutes a reasonable time depending on the circumstances of the particular case.—Maverick Oil & Gas Co. v. Howell, Ky., 237 S. W. 40.

45. **Municipal Corporations**—Ice on Sidewalk.—Where a pedestrian was familiar with the condition of a sidewalk, and knew that an unpaved portion was rough, she was required to use care and be vigilant to see unsafe and dangerous places, especially dangerous spots directly in her path, in stepping from the pavement to the unpaved portion when it was covered with ice and snow, and did so at her own risk, especially where she might have avoided the rough, slippery part of the sidewalk, by using the car tracks in the center of the street, which had been cleared of snow and were used by many pedestrians.—Nolan v. City of Pittsburgh, Pa., 116 Atl. 157.

46.——Negligence.—The trustees of a city, who were empowered to appoint policemen both under an ordinance and under General Municipal Corporation Act, § 852, as amended by St. 1919, p. 19, are not chargeable with the negligence of a policeman who was appointed by the city marshal without authority.—Baisley v. Henry, Cal., 204 Pac. 399.

47.——Unauthorized Purchase.—Under Laws 1891, c. 208, § 8, limiting expenditures of police commission to amount appropriated by city, the city was not liable for automobile purchased by the police commission for which the city had made no appropriation and for which no appropriation was thereafter made, though appropriations for the year had not been made, and all departments were run on expectation that appropriations would be made for the expenditures; the city council's determination as to whether such expense was necessary being final.—Pollard Auto Co. v. Nashua, N. H., 116 Atl. 136.

48. **Oil and Gas**—Inefficient Service.—An order by a State Corporation Commission, requiring a natural gas company to refund certain percentages of its charges to its customers, which was based, not on the failure of the company to supply a sufficient quantity of

gas, but on its failure to maintain a sufficient pressure in certain of its pipes, did not penalize the company for failure to perform an impossibility, and did not deprive it of its property witnout due process of law contrary to Const. Amend. 14.—Oklahoma Natural Gas Co. v. State of Oklahoma, U. S. S. C., 42 Sup. Ct. 287.

49. **Railroads**—Negligence.—A railroad company heid negligent in rapidly shoving a number of cars upon and along a siding near which an employee of another company was setting a switch in the dusk of the evening without guard, light, warning, or any one thereon so placed that he could look ahead.—Hastings v. South Shore R. Co., Pa., 116 Atl. 155.

50.——Negligence.—In an action for damage to an automobile which had stopped dead on the track, in which there was evidence from which it could be inferred that the engineer did not make every reasonable effort to stop the train after discovery of the danger, and that the train approached a populous crossing, without signals, at a high rate of speed, the question of whether trainmen were guilty of wantonness held for the jury.—Payne v. Roy, Ala., 90 So. 605.

51. **Receiving Stolen Goods** — "Interstate Commerce."—One who purchased an automobile with knowledge that it had been stolen, and drove it across a state line under its own power for his own purposes, or for the purpose of an ultimate future sale of it, was guilty of transporting such automobile in interstate commerce, within Act Cong. Oct. 29, 1919, known as the National Motor Vehicle Theft Act.—Kelly v. United States, U. S. C. C. A., 277 Fed. 405.

52. **Sales**—Rescission.—Under the rule that the measure of damages for breach of contract to pay a fixed sum in a particular commodity or specific article is the sum stated, where defendant seller was to pay for buyer's old car, taken at a fixed valuation, by delivery of a new one, and then be paid an additional sum, and defendant failed to comply with his agreement, the buyer could recover as damages the stipulated value of the automobile delivered to seller, and was not required to accept the return of the old one.—Gloekler v. Painter, Pa., 116 Atl. 110.

53. **Street Railroads**—Licensee.—Where plaintiff, a city employe inspecting track repair work, whose employment did not require him to ride on the street railway company's work car, entered the car to eat his lunch at the invitation of the company's foreman, he was at most a mere licensee, and not entitled to recover against the company for injury by the lurching of the car when the motorman lost control while shifting it on a grade, unless the injury was the result of intentional, wanton, or willful acts.—Bally v. Pittsburgh Rys. Co., Pa., 116 Atl. 161.

54. **Taxation** — Due Process. — The holding that, under Kansas City Charter, art. 8, § 3, where tax proceedings on account of street grading are not unreasonable or arbitrary, and land is not valued inequitably in comparison with other lands, the amount of benefits may not be reviewed by the courts, does not infringe on the due process of law provisions of the state or federal Constitution.—Nichols v. Kansas City, Mo., 237 S. W. 107.

55. **Tenancy in Common**—Reasonable Value.—A cotenant excluded from possession by his fellow tenant is entitled to recover only the reasonable rental value of his interest in the common property, and cannot compel an accounting for and recover a share of the profits actually received by the occupying tenant.—Sons v. Sons, Minn., 188 N. W. 811.

56. **United States**—Sale by Mistake.—Where the order of the President directing the sale of naval vessels authorized the sale for such price as the Secretary of the Navy shall approve, and the Secretary reserved right to reject all bids, a sale of a naval vessel to one who was thought to be the highest bidder, which was completed by the execution of a bill of sale and full payment of the purchase price, is binding against the government, though a higher bid made by another had been overlooked by mistake.—Levinson v. United States, U. S. S. C., 42 Sup. Ct. 275.

57. **Wills**—Devise Over.—A devise to the testator's unborn child, with a devise over at its death, in the absence of language to the contrary meant at the death of the child before the death of the testator.—Tomlin v. Laws, Ill., 134 N. E. 24.

58. **Workmen's Compensation** — "Able to Earn."—Under Compensation Act, § 8, par. (d), as to award for permanent partial incapacity of one-half the difference between prior earnings and the average amount the injured employee, after the injury, is "able to earn," the amount he is "able to earn," within the meaning of the statute, will never be less, and may be more, than he actually earns, although, if he is making an honest effort to work and the evidence shows he is actually earning what he is able to earn, a fair award for the partial disability suffered would be the statutory percentage of the difference between the average amount he actually earned before and that which he is actually earning since the injury.—Mt. Olive & Staunton Coal Co. v. Industrial Commission, Ill., 134 N. E. 16.

59.——Arising Out of Employment.—Where a gas company's employee, having occasion to go from a blower room to the forge, went upon a beam supporting the building, for the purpose of getting his raincoat, and then attempted to use such beam as a footpath in passing to another building, and fell and was injured, injury held not to arise out of his employment, but from an outside peril having no causal relation to his duty.—Hurley's Case, Mass., 134 N. E. 253.

60.——Common-law Marriage. — The Workmen's Compensation Act in the use of the words "husband and wife" as well as "marriage" includes common-law marriages.—Woodward Iron Co. v. Bradford, Ala., 90 So. 803.

61.——Heart Failure.—Where valve on steam boiler blew out and employee ascended ladder and closed the valve, and descended went to a window and then walked out of a door for a few steps, staggered, and fell dead, death being the result of a pre-existing disease of the heart which the excitement caused to fail, death was not compensable as resulting from traumatic "injury by accident" within Workmen's Compensation Act, defining compensable accidents.—Rusch v. Louisville Water Co., Ky., 237 S. W. 389.

62.——Injury to Manual Training Teacher.—Injury to manual training teacher of district high school held compensable, as within statutory provisions for employees in an "enterprise" and "workshop."—Board of Education v. Industrial Commission, Ill., 134 N. E. 70.

63.——Minor's Election.—Workmen's Compensation Act, § 4, providing that election by the employee to proceed under the act is a bar to recovery at common law, does not make an election by a minor binding upon him and the provision of section 8 that the guardian of a "mentally incompetent" employee may act for him does not show a legislative intent to make a minor's election binding.—Moore v. Hoyt, N. H., 116 Atl. 29.

64. Negligence.—In an employee's action for injuries caused by the breaking of a step-ladder furnished him for use by the employer, where there was evidence that it was more than 20 years old and rotten near the break, and that this defective condition might have been discovered by adequate inspection, the case was properly submitted to the jury.—McGonigle v. O'Neill, Mass., 133 N. E. 918.

65.——Operation. — Whether an employee claiming compensation for injury to his hand should submit to a surgical operation is a question for the Industrial Commission, and he should not be given an award as for permanent injury if he refuses to submit to an operation which the evidence shows would not be dangerous, and which would offer a fair chance for a complete cure.—Swift & Co. v. Industrial Commission, Ill., 134 N. E. 9.

66.——Weekly Earnings.—One employed by a lumber company to saw down trees and cut them into logs suitable for manufacture of lumber and paid for his labor at the rate of 10 to 20 cents per tree according to size, amounting to $18 to $20 per week, included in the company's biweekly pay roll, held an "employee" within the statutory definition of the term and the terms "wages" and "weekly earnings" in Workmen's Compensation Act of 1919, § 36, regardless of the question of control and supervision of the work.—Ex parte W. T. Smith Lumber Co., Ala., 90 So. 807.